



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2004

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2004-5727

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205008.

The Richardson Independent School District (the "district") received a request for information pertaining to a specified district employee as follows: 1) his personnel file; 2) certain complaints filed against him; 3) hearings, meetings and/or investigations concerning him; and 4) disciplinary action taken against him. The requestor states in his request that he is not seeking "information that the Attorney General has held to be private, including the employee's [s]ocial [s]ecurity number, health information, family information and home address."¹ You state that the district has made some of the requested information available to the requestor. You indicate that the district is withholding some of the requested information pursuant to Open Records Decision No. 634 (1995).² You also indicate that portions of the remaining requested information are excepted from disclosure pursuant to

¹ In this regard, we note that portions of the information that the district submitted to us for review, which we have marked, are not responsive to the request for information. Accordingly, we conclude that the district need not provide the requestor with this particular marked information in response to this ruling.

² We note that in Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold information protected by the Family Educational Rights and Privacy Act ("FERPA") and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception to disclosure. Since the district has made a determination that portions of the requested information constitute "student records," the district must comply with FERPA guidelines with regard to that information.

sections 552.024, 552.026, 552.101, 552.102, 552.107, 552.114, 552.117, 552.130, 552.135, and 552.137 of the Government Code.³ We have considered the exceptions you claim and have reviewed the submitted representative sample documents.⁴

You indicate that portions of the submitted information are confidential under FERPA. We note that section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"); *see also* Open Records

³ We note that section 552.024 of the Government Code does not constitute an exception to disclosure under the Public Information Act (the "Act"). Accordingly, this ruling does not address whether any portion of the remaining requested information is excepted from disclosure under section 552.024 of the Government Code.

⁴ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Decision Nos. 332 at 3 (1982), 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA), 206 at 2 (1978). Based on our review of the submitted information, we have marked the portions of this information that are confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA.⁵

In addition, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.⁶ Section 21.355 provides, "A document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. We note that this office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See id.* Based on your arguments and our review of the submitted information, we find that portions of this information, which we have marked, are confidential under section 21.355. Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also claim that the remaining submitted information, or portions thereof, is excepted from disclosure pursuant to section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be excepted from disclosure under

⁵ Because we base our ruling regarding this particular marked information on FERPA and section 552.114 of the Government Code, we need not address your claim under section 552.137 of the Government Code.

⁶ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure by the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we address the district's section 552.102(a) claim under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Information is protected from disclosure by the common-law right to privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has since concluded that other types of information also are protected from disclosure by the common-law right to privacy. *See Open Records Decision Nos. 659 at 4-5 (1999)* (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g., Open Records Decision No. 600 (1992)* (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure).

After carefully considering your arguments and reviewing the remaining submitted information, we find that no portion of this information is protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information under section 552.102(a) of the Government Code. *See Open Records Decision Nos. 470 (1987)* (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

We note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) provides that a transcript from an institution of higher education maintained in the personnel file of a professional public school employee is excepted from disclosure pursuant to section 552.102(b), except for the information in the transcript pertaining to the degree obtained or the curriculum. *See Gov't Code § 552.102(b)*. Accordingly, we conclude that the district must withhold the college transcripts that we have marked pursuant to section 552.102(b) of the Government Code, except for the information in these transcripts pertaining to the curriculum and degree obtained.

In addition, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. *See Gov't Code § 552.107(1)*. When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless

otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that these portions of the submitted information are notes taken by you in your role as attorney for the district that reflect information that you received from district investigators and that form the basis from which you provided legal advice to the district. Based on your representations and our review of these portions of the submitted information, we agree that this information constitutes communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the district may withhold the information that we have marked pursuant to section 552.107(1) of the Government Code.

You also indicate that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. *See Open Records Decision No. 530 at 5 (1989)*. Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the district. The district may not withhold such information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Based on our review of the remaining submitted information, we have marked the portion of this information that is excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code, provided that the current or former employee with whom this information is associated elected confidentiality for this information prior to the date that the district received this request for information.

You further indicate that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130*. Accordingly, we conclude that the district must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

Finally, you claim that the remaining submitted information, or portions thereof, is excepted from disclosure pursuant to section 552.135 of the Government Code. Section 552.135 provides:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception to disclosure must clearly identify the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). In this case, we find that the district has failed to sufficiently demonstrate that any conduct reported to the district concerns a possible violation of criminal, civil, or regulatory law under section 552.135. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information under section 552.135 of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to section 552.114 of the Government Code and FERPA. The district must withhold the

information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information that we have marked pursuant to section 552.102(b) of the Government Code, except for the information in the transcripts pertaining to the curriculum and degree obtained. The district may withhold the information that we have marked pursuant to section 552.107(1) of the Government Code. The district must withhold the information that we have marked pursuant to section 552.117(a)(1) of the Government Code, provided that the current or former employee with whom this information is associated elected confidentiality for this information prior to the date that the district received this request for information. The district must withhold the information that we have marked pursuant to section 552.130 of the Government Code. The district must release to the requestor the remaining submitted information that is responsive to the request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

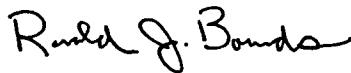
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 205008

Enc. Marked documents

c: Mr. Matthew A. Jacob
The Dallas Morning News
Communications Center
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)